NO. 88-1462

FILED
MAY 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

T. SMITH & SON, INC., ET AL
Petitioner

VERSUS

JULES SIMEON, SR. and IDA MAE GRIFFIN SIMEON, Wife of Jules Simeon, Sr. and LUMAR MARINE, INC.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID L. CARRIGEE
JAMES G. BURKE, JR.
20th Floor, Energy Centre
New Orleans, Louisiana 70163
Telephone: (504) 569-2900
and
BURKE & MAYER, Of Counsel
Attorneys for Lumar Marine, Inc., Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

15pp

INTERESTED PARTIES

1. Jules Simeon, Sr.
2. Ida Mae Griffin Simeon
3. T. Smith & Son, Inc.
4. Lumar Marine, Inc.
5. Midland Insurance Company
6. Glacier General Insurance Co.
7. Underwriters at Lloyds, London
8. Burke & Mayer
9. Rice & Fowler
10. Porteous, Hainkel, Johnson & Sarpy
11. Hebert, Mouledoux & Bland
12. Taco Towing, Inc.
13. Yugo Marine, Inc.
14. Champion Growers, Inc.

TABLE OF CONTENTS

Interested Parties i

Table of Contents ii

Table of Authorities iii

Summary of the Argument 1

Argument 2

Conclusion 9

TABLE OF AUTHORITIES

CASES **Page**

Davis v. Hill Engineering,
549 F.2d 314 (5th Cir. 1977) 6

Ferguson v. Moore-McCormack Lines, Inc.,
352 U.S. 521,
77 S.Ct. 457 (1957) 6

Kermarec v. Compagnie Generale Transatlantique,
358 U.S. 625,
79 S.Ct. 406 (1959) 6

Seas Shipping Co. v. Sieracki,
328 U.S. 85,
66 S.Ct. 872 (1946) . 1, 2, 3, 4, 5, 7, 9

Simeon v. T. Smith & Son, Inc.
852 F.2d 1421 (5th Cir. 1988) 7

United States v. Reliable Transfer Co.
421 U.S. 397, 95 S.Ct.
1708 (1975) 3

STATUTES

Jones Act,
46 U.S.C. §688 (1982) 5, 6

OTHER AUTHORITIES

Granelli, The Attack on Joint and Several Liability
71 A.B.A.J. 61 (July, 1985) 7

Pearson, Apportionment of Losses Under Comparative Fault Laws -- An Analysis of the Alternatives
40 La. L. Rev. 343 (1980) 8

Pressler & Schieffer, Joint and Several Liability: A Case for Reform
64 Den. L. Rev. 651 (1988) 7

SUMMARY OF THE ARGUMENT

Respondent, Lumar Marine, Inc. ("Lumar"), concurs with the position of Petitioner, T. Smith & Son, Inc. ("Smith"), that the traditional rule of joint and several liability is incompatible with the modern philosophy of equitable apportionment of damages inherent in the doctrine of comparative negligence. Smith, however, relies on this Honorable Court's decision in Seas Shipping Co. v. Sieracki,[1] for the proposition that it is the legal standard of care owed by the joint tortfeasors to the plaintiff which is determinative of whether they can be held jointly liable to the plaintiff. Lumar submits that this reliance is misplaced.

The principles of comparative negligence call for liability to be

---

[1] 328 U.S. 85, 66 S.Ct. 872 (1946).

allocated proportionately among all those whose conduct brought about the harm without regard to the theories of liability asserted by the plaintiff against each joint tortfeasor. For this reason, reconsideration of the rule of joint and several liability in admiralty is inappropriate in the context of the argument advanced by Smith and its Petition for Writ of Certiorari should be denied.

ARGUMENT

MAY IT PLEASE THE COURT:

The decision of the United States Court of Appeals for the Fifth Circuit in the case at bar is not in conflict with this Court's ruling in Seas Shipping Co. v. Sieracki.[2] Therefore, while Lumar respectfully urges this Court to reevaluate the viability of joint and several

---

[2] 328 U.S. 85, 66 S.Ct. 872 (1946).

liability in light of the principles of comparative negligence embraced by the general maritime law after United States v. Reliable Transfer Co.,[3] it submits that Smith's primary argument on this issue is without merit. Accordingly, Lumar suggests that Smith's Petition should be dismissed and that the doctrine of joint and several liability should be reconsidered in the context of Lumar's Petition for Writ of Certiorari which was filed contemporaneously with that of Smith.[4]

In Seas Shipping Co. v. Sieracki,[5] this Court held that the owner of a vessel whose

---

[3] 421 U.S. 397, 95 S.Ct. 1708 (1975).

[4] See, Petition for Writ of Certiorari of Lumar in "Lumar Marine, Inc. v. Jules Simeon, Sr. and Ida Mae Griffin Simeon v. T. Smith & Son, Inc.", No. 88-1398 on the docket of the Supreme Court of the United States.

[5] 328 U.S. 85, 66 S.Ct. 872 (1946).

unseaworthy condition was a contributing cause of a longshoreman's injury could not be held jointly liable with two other parties whose negligence had contributed to the injury. This ruling was premised on the conclusion that liability for unseaworthiness "rests upon an entirely different basis"[6] from liability for negligence. The non-delegable obligation of seaworthiness was held to be a "species of liability without fault"[7] imposed on the vessel owner regardless of any negligent act or omission on the part of the vessel or its owner. Thus, the vessel owner to whom no negligence was attributed was not held to be jointly liable with the negligent parties.

---

[6] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 89, 66 S.Ct. 872, 875 (1946).

[7] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 94, 66 S.Ct. 872, 877 (1946).

In the case at bar, neither Lumar nor Smith was held liable to Jules or Ida Mae Simeon for breach of a duty of seaworthiness. The United States District Court for the Eastern of Louisiana found, and the Fifth Circuit affirmed, that the negligence of both Lumar and Smith contributed to the damages sustained by the Simeons. However, because Jules Simeon's cause of action against Smith arose under the Jones Act[8] and his cause of action against Lumar arose under the general maritime law, Smith argues that Seas Shipping Co. v. Sieracki[9] prohibits holding Smith and Lumar jointly liable for the general and special damages awarded to Simeon which were recoverable against both defendants.

---

[8] 46 U.S.C. § 688 (1982).

[9] 328 U.S. 85, 66 S.Ct. 872 (1946).

Lumar avers that the Fifth Circuit was entirely correct in finding this argument to be without merit. The Jones Act[10] permits a seaman to recover against his employer for even the "slightest degree of negligence"[11] but the general maritime law permits recovery for negligence only upon a showing of a failure to exercise a reasonable degree of care.[12] Nevertheless, the Fifth Circuit held that:

> ...despite the fact that the respective obligations of Lumar and Smith towards Simeon arise from different sources, **the obligation**

---

10 46 U.S.C. § 688 (1982).

11 See, Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521, 77 S.Ct. 457 (1957); Davis v. Hill Engineering, 549 F.2d 314 (5th Cir. 1977).

12 See, Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 79 S.Ct. 406 (1959).

> **is the same: to avoid fault by acting reasonably.** Sieracki is distinguishable from this case on grounds that unseaworthiness is not based on fault. [emphasis added].[13]

Thirteen years ago, joint and several liability was the rule in every state.[14] Now, at least thirty-three states have either abolished or substantially modified joint and several liability.[15] This shift away from the traditional rule of joint and several liability was prompted by the reasoning that:

---

[13] Simeon v. T. Smith & Son, Inc., 852 F.2d 1421, 1431 (5th Cir. 1988), Appendix Section A at A-39.

[14] Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L. Rev. 651, 666 (1988), citing Granelli, The Attack on Joint and Several Liability, 71 A.B.A.J. 61, 62 (July, 1985).

[15] Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. L. Rev. 651, 656-660 (1988).

> **The principle of loss apportionment by shares of negligence that isolates a defendant from liability to the plaintiff for loss due to plaintiff's negligence also should serve to isolate a defendant from liability for loss to the plaintiff attributable to the negligence of another defendant.** [emphasis added].[16]

Thus, it is not the fact that Simeon's right of action for negligence against Smith and Lumar arose under two distinct legal sources that compels reevaluation of the traditional rule of joint and several liability. Rather, this rule should be reconsidered because it cannot be

---

[16] Pearson, Apportionment of Losses Under Comparative Fault Laws -- An Analysis of the Alternatives, 40 La. L. Rev. 343, 362 (1980).

reconciled with the modern philosophy that liability should be allocated proportionately among all those whose conduct brought about the harm.

CONCLUSION

The ruling of the Fifth Circuit on the issue of joint and several liability in the case at bar does not conflict with this Court's ruling in Seas Shipping Co. v. Sieracki.[17] Therefore, because Smith relies on a conflict between those decisions as the primary support for its Petition, the Petition should be denied.

It is respectfully suggested that a determination as to whether the traditional rule of joint and several liability contravenes the loss apportionment policy inherent in the doctrine of comparative negligence would be more appropriately

---

[17] 328 U.S. 85, 66 S.Ct. 872 (1946).

made in the context of the Petition for Writ of Certiorari filed by Lumar.[18]

Respectfully submitted,

DAVID L. CARRIGEE
JAMES G. BURKE, JR.
20th Floor - Energy Centre
1100 Poydras Street
New Orleans, Louisiana 70163
Telephone: (504) 569-2900
and
BURKE & MAYER, Of Counsel
Attorneys for Respondent
Lumar Marine, Inc.

---

18 See, Petition for Writ of Certiorari of Lumar in "Lumar Marine, Inc. v. Jules Simeon, Sr. and Ida Mae Griffin Simeon v. T. Smith & Son, Inc.", No. 88-1398 on the docket of the Supreme Court of the United States.